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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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AUGUST 24, 1984

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A. Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5003

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

THE HONORABLE ALCEE L. HASTINGS,
Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 20, 1984)

Before CAMPBELL*, Chief Judge, PELL** and KEARSE***, Circuit Judges.

CAMPBELL, Chief Judge:

*Honorable Levine H. Campbell, Chief Judge for the U.S. Court of Appeals for the First Circuit, sitting by designation.

**Honorable Wilbur F. Pell, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

***Honorable Amalya Lyle Kearse, U.S. Circuit Judge for the Second Circuit, sitting by designation.

This is an appeal by Judge Alcee Hastings, a district judge for the United States District Court for the Southern District of Florida, from an order of the District Court for the Southern District of Florida (Gordon, J., sitting by designation). The order allows the Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee"), to inspect the records of a federal grand jury proceeding which had returned a criminal indictment against Judge Hastings leading to his trial and acquittal.

The indictment had charged Judge Hastings with soliciting a bribe in exchange for a judicial decision. The indictment had also charged one William Borders, Jr., with offering the bribe. Each accused was separately tried. Borders was convicted, and his conviction was affirmed on appeal. United States v.

Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 103 S.Ct. 1875 (1983). Judge Hastings was then tried; he was acquitted. Less than two months later, two of three district judges belonging to the Judicial Council of the Eleventh Circuit (the "Council") filed a complaint with the Council against Judge Hastings asking that he be disciplined pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, § 3(a) (the "Act"). 28 U.S.C. § 372(c). Citing to the same matters for which Judge Hastings had been tried and acquitted, the complaint charged that his conduct, including this trial testimony, demonstrated that he had violated the Code of Judicial Conduct. Complainants asked the Council to make such orders as were necessary "to vindicate the Honor of United States Judges and discipline [Judge

Hastings] for his odious behavior," including recommending to the House of Representatives that he be impeached.

Chief Judge Godbold of the Eleventh Circuit appointed himself and four other judges (including the circuit judge who had written the court's opinion in Borders's unsuccessful appeal) to a special committee to investigate the complaint as provided for in section 372(c)(4) of the Act.[1]

---

1. Paragraphs (3), (4) and (5) of subsection 372(c) govern the initial handling of complaints:

> (3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may--
>
> (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1)of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

The Committee then filed a petition with the District Court for the Southern

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(cont.)

> (B) concluded the proceedings if he finds that appropriate corrective action has been taken.
>
> The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.
>
> (4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--
>
> (A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;
>
> (B) certify the complaint and any other documents pertaining thereto to each member of such committee; and
>
> (C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

District of Florida seeking access to the records of the grand jury that had indicted Judges Hastings. In its petition the Committee alleged that,

> As part of its investigation of the facts and allegations of the complaint filed against Judge Hastings, the Committee has determined that it must examine the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and Mr. Borders.
> . . .
> The Committee is required by statute to conduct and maintain

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(cont.)

> (5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

its proceedings, in confidence. 28 U.S.C. § 372(c)(14).[2]

The Justice Department's Public Integrity Section responded in support of the Committee's petition. Judge Hastings filed an answer and affirmative defenses

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2. Section 372(c)(14) provides:

> (14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceedings unless--
>
> > (A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or
> >
> > (B) authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

in opposition to the petition, as well as a cross-petition for public disclosure of the grand jury records. A newspaper, The Miami Herald, also petitioned for public release of the records.

At a hearing on the petition, Judge Hastings vigorously opposed any disclosure. He contended that the Committee's petition was in furtherance of a conspiracy to deprive him of his constitutional rights and that it was motivated by a desire to retaliate against him for having exercised his constitutional rights at his criminal trial. He asserted that once acquitted he should not be subjected to a judicial investigation which can only undermine his Article III independence. Further, Judge Hastings argued that the Committee's petition was unlawful under the Act and that the disclosure of the grand jury records was not permitted by

Fed. R. Crim. P. 6(e), governing grand jury secrecy.

The district court issued a memorandum opinion rejecting Judge Hastings's arguments and stating that it would grant the Committee access to the grand jury materials but would deny public disclosure. In re Petition to Inspect Grand Jury Materials, 576 F. Supp. 1275 (D. Fla. 1983). The court asserted that Rule 6(e) did not provide the exclusive basis for releasing grand jury materials. Rather, the court was of the opinion that it could order disclosure under its inherent power as supervisor of the grand jury if, in the interest of justice, the Committee's need outweighed the important and long-established policy of grand jury secrecy. See Douglas Oil Co. v. Petro Stops Northwest, 441 U.S. 211, 218-19 (1979); United States v. Procter & Gamble Co., 356 U.S. 677,

681-82 (1958). The district court struck the balance in favor of disclosure:

> [I]t is this Court's duty to balance the need for effective administration of the Congressionally established procedure for judicial self-discipline against the traditional factors favoring the "'indispensable secrecy of [the] grand jury proceedings.'" [Citations omitted.] A careful evaluation of these competing concerns leads this Court to the inescapable conclusion that the minimal trespass upon the traditional values associated with grand jury confidentiality is significantly outweighed by the need of the Special Committee to examine the grand jury material and expeditiously execute its Congressional duty, thereby furthering the broad purposes of the Act.

576 F. Supp. at 1281.

Recognizing the need to minimize the breach of secrecy, the district court, in its accompanying order, imposed restrictions as to the time and conditions of access. It provided that,

1) access is permitted for a period of ninety days;

2) the records are to be kept in the office of the United States Attorney for the Southern District of Florida;

3) only the five members of the Committee, their counsel, and one secretarial assistant are permitted to view the records;

4) no reproduction is permitted except for single copies of records necessary to supplement the Committee's report, which must be kept under seal except before the Judicial Council;

5) the members of the Committee, their counsel, and the secretarial assistant are ordered to keep all information obtained from the records in strict confidence.

Judge Hastings appealed from allowance of the Committee's petition, though not from the denial of his cross-petition for public disclosure. The Miami Herald

filed a notice of appeal which has since been voluntarily dismissed. We have stayed the district court's disclosure order pending resolution of this appeal.[3]

I. THE COMMITTEE'S STANDING TO PETITION FOR GRAND JURY MATERIALS

Judge Hastings contends that the Committee was without standing under Article III to bring a proceeding in the district court seeking access to grand jury materials. He argues that absent more explicit congressional authorization the Committee, as an entity of the United States, cannot initiate this petition. United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977).

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3. Because all the regular judges of the Court of Appeals for the Eleventh Circuit have recused themselves, the Chief Justice of the United States has designated the judges comprising the present panel to sit on this appeal.

We do not agree. Assuming the standing doctrine enunciated in Mattson and Solomon applies to the Committee's petition, we nonetheless hold that the Committee's statutory duty to "conduct an investigation as extensive as it considers necessary," 28 U.S.C. § 372(c)(5), provides the necessary congressional grant of standing to petition for grand jury records. As the district court said:

> A contrary construction of the Act would be wholly inconsistent with its broad purpose -- to preserve the integrity of the judiciary, to maintain public confidence in the judicial process, to protect the wrongfully accused, and to strengthen judicial independence. The goals are better served by a careful evaluation of the need asserted in the petition, rather than denying the authority of the Committee to initiate the petition in the first instance.

576 F. Supp. at 1279 (footnote omitted).

Further evidence that Congress intended the Committee to have standing to

petition for records of this type can be found in its conferral of "full subpoena powers" upon the Committee, 28 U.S.C. § 372(c)(9)(A). A subpoena would have been issued by the clerk of the court of appeals, 28 U.S.C. § 332(d)(1), and been subject to enforcement through the contempt power of the court of appeals. See Fed. R. Civ. P. 45(f). Had the Committee subpoenaed the records, however, it would have thrust the court of appeals into the novel role of supervising disclosure of grand jury materials. The Committee instead sought the records through the traditional path of petitioning the district court. This choice was prudent since it permitted the district court to exercise its customary control over grand jury materials. We see no point in erecting barriers to discourage the Committee from following a judicially

sound alternative to its statutory subpoena power. At the same time, Congress's express grant of subpoena power is an indication that Congress meant the Committee to have wide-ranging power of its own to secure necessary materials, and that a petition of this nature is not, therefore, outside the ambit of its intended powers.

Judge Hastings further contends that, even if the Committee has standing, only the Attorney General may bring a petition for access to grand jury materials. He cites 20 U.S.C. § 516 which provides,

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

We do not believe that section 516 bars the Committee from acting in its own behalf in petitioning for access to the

grand jury records. An investigating committee under paragraph (4) of section 372(c) is an arm of the judicial branch, not an executive agency. While it may doubtless enlist the aid of the Attorney General on appropriate occasions it was not bound to do so here. Congress certainly never intended a judicial investigating committee to be beholden to the Attorney General for permission to seek the information it needs. Cf. Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973) ("this section [28 U.S.C. § 516] does not require a congressional litigant to be represented by the Justice Department"). The independence of the Committee is indicated both in its mandate to "conduct an investigation as extensive as it considers necessary," 28 U.S.C. § 372(c)(5), and in its investiture with

"full subpoena powers," permitting it to have sought the materials directly, 28 U.S.C. § 372(c)(9)(A). In the present context, we see little difference between a petition and a subpoena. The Committee was entitled to litigate on its own, without reference to section 516.

Judge Hastings also argues that because this case involves important Article II concerns, all Article III judges, wherever located, have a "substantial interest" in the case and therefore must disqualify themselves under 28 U.S.C. § 455. The Supreme Court rejected such a construction of section 455 in United States v. Will, 449 U.S. 200 (1980), a case involving the compensation clause, which guarantees the inviolability of federal judges' salaries. Under the Rule of Necessity an interested judge may sit if the alternative would be to deny litigants a forum.

> As this Court has observed elsewhere, the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary. . . . The public might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the question presented. On balance the public interest would not be served by requiring disqualification under § 455.

449 U.S. at 217. The same reasoning applies to the present case involving an investigation under a statute designed to safeguard the integrity of the federal judiciary. We therefore decline to disqualify ourselves under section 455.

II. THE DISTRICT COURT'S AUTHORITY TO ALLOW THE COMMITTEE ACCESS TO GRAND JURY RECORDS

The main issue presented is whether the district court had authority to set aside the usual secrecy surrounding grand jury records in favor of the Committee.

In contending that the court lacked such authority, Judge Hastings argues that Fed. R. Crim. P. 6(e) is the controlling source of law in this area, and that none of its stated exceptions to the rule of secrecy apply to the Committee. Rule 6(e) provides as follows:

> (1) **Recording of Proceedings.** . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.
>
> (2) **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . .
>
> (3) **Exceptions.**
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its

deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

. . .

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceedings;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Judge Hastings contends that the only arguably relevant exception is Rule 6(e)(3)(C)(i), but that the Committee's investigation is not "preliminarily to or in connection with a judicial proceeding."

The district court aparently agreed that neither the Rule 6(e)(3)(C)(i) exception nor any other express exception to the secrecy requirement in Rule 6(e) was applicable. It rejected, however, the assumption that Fed. R. Crim. P. 6(e) "provides the exclusive framework within which [the court's] discretion is to be exercised." Rather the court held that Rule 6(e) did not preclude it "from fashioning an alternate method for disclosure under its general supervisory authority over grand jury proceedings and records." We support this analysis in the special circumstances of a judicial investigation under section 372(c). In so doing, we observe that the Committee's

posture in seeking the grand jury materials is at least closely analogous to the situation for which the explicit Rule 6(e)(3)(C)(i) exception was created. The procedures for which the grand jury materials are being garnered may not be a "judicial proceeding" in the strict sense, see infra, but they are very similar. This fact, as well as the unique character of the Committee, the scope of its investigative powers, and the importance of its mission, all bolster the district court's conclusion that it was appropriate to exercise its inherent power in this context.

A. Source of the District Court's Inherent Power

The district court's belief that it had inherent power beyond the literal wording of Rule 6(e) is amply supported. This is not to say the rule is not normally controlling. It is. But it has

been authoritatively said that the rule is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court:

> [T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959) (footnotes omitted). The Advisory Committee's note on Rule 6(e) states, "This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure . . . ." Notes of Advisory Committee on Rules, following Fed. R. Crim. P. 6. This concept, to be sure,

provides little guidance as to when a court is free to go beyond the rule; still, it is certain that a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule. "Rule 6(e) which was not intended to create new law, remains subject to the law or traditional policies that gave it birth." In re Report & Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1229 (D.D.C.), mandamus denied, 501 F.2d 714 (D.C. Cir. 1974). See also In re Biaggi, 478 F.2d 489 (2d Cir. 1973).

The history of Rule 6(e) offers an interesting picture of how courts' "inherent power" has shaped the rule. First adopted by the Supreme Court in 1944, Rule 6(e) has been repeatedly amended to incorporate subsequent developments wrought in decisions of the federal

courts. In 1971 a district court went beyond the language of Rule 6(e), which at the time permitted disclosure only to "attorneys for the government," and permitted access to grand jury records by agents of the IRS in connection with a Justice Department probe. In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971). In 1977 Rule 6(e) was amended to also allow disclosure to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The Advisory Committee cited Pflaumer and noted that "[a]lthough case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their

expertise is required." Notes of Advisory Committee on Rules, following Fed. R. Crim. P. 6.

In 1983 the rule was again amended to incorporate a development in the law by the courts:

> New subdivision (e)(3)(C)(iii) recognizes that it is permissible for the attorney for the government to make disclosure of matters occurring before one grand jury to another federal grand jury. Even absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances. See e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Garcia, 420 F.2d 309 (2d Cir. 1970).

Notes of Advisory Committee on Rules, following Fed. R. Crim. P. 6 (emphasis added). These examples from the history of Rule 6(e) indicate that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance

with the rule's general rule of secrecy. See generally Fallen v. United States, 378 U.S. 139, 142 (1964) ("the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances").

Accordingly, we do not believe that the district court's power to permit the Committee access to the otherwise secret grand jury minutes must stand or fall upon a literal construction of the language of Rule 6(e).[4]

B. Request of Judicial Investigating Committee May Suffice for Exercise of Court's Inherent Power

The above conclusion does not, of

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4. This conclusion is in no way inconsistent with the provision in the Act that "Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect . . . the Federal Rules of Criminal Procedure. . . ." 28 U.S.C. § 372(c)(16). Our holding does not amend Rule 6(e) nor does it permit investigating committees under the Act to circumvent the court-fashioned standards applicable to Rule 6(e). See infra Part III.

course, end the matter. The next question is whether the petition of a judicial investigating committee is the kind of request which, in proper circumstances, can trigger a district court's inherent power to release grand jury minutes. Certainly, as the court below stated, courts must adhere to Rule 6(e) in "garden variety" petitions for grand jury disclosure. The rule was inteded to provide a reliable statement of the law in this area, and would be rendered meaningless if departures were freely sanctioned. We assume that courts are not empowered to act outside Rule 6(e) in other than exceptional circumstances consonant with the rule's policy and spirit. Like the district court, however, we believe the request of a judicial investigating committee may constitute such an exceptional situation.

We think it highly significant that the grand jury materials in question were sought by an investigating committee acting pursuant to express statutory authority to "conduct an investigation as extensive as it considers necessary . . . ." 28 U.S.C. § 372(c)(5) (emphasis added).[5] There is every indication that Congress meant this open-ended grant to be read just as broadly as it is written. The House Report on the Act states that "Paragraph (c)(5) provides the special

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5. As the rule of secrecy derives from "a long-standing rule of common law," Congress can apparently create statutory exceptions to the Rule 6(e) standards for disclosure. Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356, 1361 & n.11 (1983). We do not suggest here that the broad grant of power to investigating committees under section 372(c) goes so far as to indicate a congressional intent to circumvent completely the secrecy concerns of Rule 6(e). But in passing on the propriety of an exercise of inherent power, courts may take into account "a specific statutory policy favoring disclosure in particular circumstances." Id. at 4315 (Brennan, J., concurring).

committee with broad flexibility and general authority to investigate the facts and allegations contained in the complaint." H.R. Rep. No. 1313, 96th Cong., 2d Sess. 11 (1980) (emphasis added). And the unique composition of an investigating committee makes such an extensive delegation reasonable. The federal judges who compose it are sheltered by Article III, and must as an obligation of their office conduct an unbiased, objective inquiry. They are suited by experience and professional training to determine what evidence needs to be examined, and to deal discreetly with all types of evidence, including confidential materials like those here in issue.

Moreover, the question under investition -- whether an Article III judge should be recommended for impeachment by the Congress, otherwise disciplined, or

granted a clean bill of health -- is a matter of great societal importance. Given the character of an investigating committee and what is at stake -- the public confidence in the judiciary, the independence and reputation of the accused judge -- paragraph (c)(5) must in our view be read, with very few strings, as conferring authority to look into whatever is material to a determination of the truth or falsity of the charges.

Beyond this construction derived from the breadth of the statutory language, there is support in the legislative history for the specific proposition that Congress intended a judicial investigating committee to have access to grand jury minutes. Several years before section 372(c) was enacted, during the Watergate impeachment proceedings, District Judge Sirica had ruled that he possessed inher-

ent power to deliver grand jury materials to the House Committee on the Judiciary; and he had exercised that power. In re Report & Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. at 1227-30. Since Congress clearly conceived of section 372(c) as a form of alternative to impeachment, it is logical to infer that Congress intended a judicial investigating committee to enjoy access to grand jury materials on a basis similar to that provided to Congress by Judge Sirica. See S. Rep. No. 96-362, 96th Cong., 2d Sess. 4-6, reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4318-20; Judicial Tenure Act: Hearings on S. 1423 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm., 95th Cong., 1st Sess. 24-26 (1977) (Statement of Senator Nunn).

This inference finds support in the colloquy in Judicial Tenure and Discipline

-- 1979-80, Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 142-43 (1980). There Representatives Rodino and McClory referred to the Judiciary Committee's acquisition of grand jury materials during the Watergate proceedings and the need for access to confidential information if the proceedings proposed by the bill are to succeed. Thus, in the context of a question by Representative Kastenmeier as to whether information possessed by the Justice Department would be available, the colloquy included the following:

> Chairman RODINO. . . . I think that while, as Mr. McClory suggested a while ago, there has to be utmost care in keeping confidential certain data and certain records, that certainly could prejudice, and I think we have to regard that as a necessary risk. But I believe that the judiciary has to recognize that there is a need for this

> kind of extension of the line of communication, if indeed we are going to succeed in this.
>
> Mr. McCLORY. Let me just add that I think there should be disciplinary action taken against a judge who violates the confidence of material that is delivered to him in confidence.
> . . . .
>
> We have very good communication during the impeachment inquiry with the Federal judge from whom we received grand jury information which, of course, is required to be secret. We carefully observed the secrecy of those confidential communications, and I think that it was an important consideration. A violation of such confidence should, I believe, be subject to some kind of discipplinary [sic] action.

While cryptic, the colloquy is fairly susceptible to the interpretation that Congress believed the court could and should give the investigating judges access to grand jury materials.

We accordingly view an investigating committee's petition to inspect grand jury materials as being backed by a congres-

sional mandate; and we believe this mandate furnishes special justification for the district court to exercise its supervisory power upon a committee's request. See note 5, supra.

The above construction is reinforced by the fact that, in enacting section 372(c), Congress was clearly anxious to establish public confidence in the investigatory mechanism. The Senate Judiciary Committee noted,

> It is important that the American people continue to be confident in their Federal judiciary. The perception of a viable healthy judiciary is of critical importance to our system of justice. With this thought in mind, the Committee is of the view that a statutory procedure be implemented to assure the public that valid citizen complaints are being considered in a forthright and just manner. Once again, the perception of justice is of critical importance . . . .

S. Rep. No. 362, 96th Cong., 1st Sess. 7 (1979), reprinted in 1980 U.S. Code Cong.

& Ad. News. 4315, 4321. Absent a review of the record of the grand jury that actually indicted a federal judge, a committee's investigation might well not reach the degree of thoroughness necessary to ensure public confidence that justice had been done.[6] Indeed, the public would quickly question the sincerity of an investigation that did not even gain access to grand jury records under the federal courts' control. We thus infer not only from the Act's broad language but from its purpose a clear congressional intent that grand jury materials be among those available to a committee in appropriate circumstances.

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6. In an investigation going to the character and worthiness of trust of an individual, the Committee's ability to say that it has checked out everything can be important. If an extensive examination turns up nothing or only trivia, its findings will serve to enhance the reputation of the judge. If the examination is not sufficiently extensive, there will always be lingering doubts.

A further justification for the court's invocation of its inherent power here is the close correspondence between the present situation and the express exception to grand jury secrecy allowed in Fed. R. Crim. P. 6(e)(3)(C)(i). The latter exception permits the district court to direct disclosure "preliminarily to or in connection with a judicial proceeding." (Emphasis supplied.)

To be sure, the circuit council and Judicial Conference proceedings to which an investigating committee's investigation is ancillary are not proceedings before any identifiable court, and for this reason, may not be a "judicial proceeding" within the precise language of the exception. A single circuit council includes a mixture of judges from the court of appeals and from various district courts; and the Judicial Conference of the

United States is made up of judges from many different courts. See, e.g., Henry v. United States, 432 F.2d 114, 119-20 (9th Cir. 1970) (when members of the circuit council act, "they act as a council, not a court."), cert. denied, 400 U.S. 1011 (1971). Actions by a circuit council or the Judicial Conference do not, therefore, exactly fit within Judge Learned Hand's widely quoted definition of a "judicial proceeding" -- that it "includes any proceeding determinable by a court . . . ." Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958). By the same token, impeachment proceedings before Congress, which are a possible outcome of this investigation, are not by a "court," although the Congress becomes something like a court for this purpose. Compare Kilbourne v. Thompson, 103 U.S. 168, 190 (1881).

Nonetheless, while a committee's investigation is thus perhaps not ancillary to a "judicial proceeding," in the strict sense, the judge-run proceedings with which it is connected fit within Justice Holmes's definition of a "judicial inquiry":

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

Prentise v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). Under that definition, a state court's bar disciplinary proceeding has been characterized as a judicial inquiry. Erdmann v. Stevens, 458 F.2d 1205, 1208-09 (2d Cir.), cert. denied, 409 U.S. 889 (1972). Proceedings by a circuit council after a committee's investigation closely mirror Justice Holmes's definition. Upon receipt of a committee's report, a circuit council,

> (A) may conduct any additional investigation which it considers necessary;
> (B) shall take such action as is appropriate to assure the effective administration of the business of the courts within the circuit . . . .

28 U.S.C. § 372(c)(6). A circuit council, although not a court, is clearly charged with investigating, declaring and enforcing liabilities (short of impeachment) on the basis of past facts under the legal standard of "effective administration of the business of the courts." Furthermore, a council's proceedings must, as a minimum, satisfy the procedural mandates of the Act, which require that:

> (A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;
>
> (B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to

> present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and
>
> (C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

28 U.S.C. § 372(c)(11).

Given the judicial character of a circuit council's procedures, and the "judicial inquiry" that comprises a council's task, a council's review is little removed from the judicial proceedings encompassed within the Rule 6(e)(3)(C)(i) exception, whether or not it is a judicial proceeding in the struct legal sense. Disclosure to an investigating committee is, therefore, closely akin to a Rule 6(e)(3)(C)(i) disclosure "preliminarily to . . . a judicial proceeding."

For the above reasons, we believe that a petition by a judicial investigating committee presents one of the occasions when a district court may act outside the strict bounds of Rule 6(e), in reliance upon its historic supervisory power. Permitting such a committee to have access to grand jury materials in proper circumstances would be consistent with Congress's intent under the Act and with the policy and spirit of Rule 6(e).

III. THE DISTRICT COURT'S EXERCISE OF DISCRETION IN THE PRESENT CASE

Having concluded that the Committee was entitled to petition for the grand jury records and that the district court had power, upon a showing of proper circumstances, to grant that petition, we must still decide whether the district court properly allowed the petition on the facts of this case. For while, as indicated above, a district court may grant

access in this type of situation under its inherent power, we believe it may only do so in an appropriate factual situation and with due regard to the standards for disclosure enunciated by the Supreme Court.

The Supreme Court has emphasized "that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). Accordingly, "[the] 'indispensable secrecy of grand jury proceedings,' United States v. Johnson, [319 U.S. 503, 513 (1943)], must not be broken except where there is a compelling necessity." United States v. Procter & Gamble, 356 U.S. 677, 682 (1958). The Supreme Court has delineated a test for deciding when disclosure is appropriate:

> It is clear from Procter & Gamble and Dennis [v. United States, 384 U.S. 855 (1966)] that disclosure is appropriate

> only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. . . . In sum, as so often is the situation in our jurisprudence, the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material. . . . Moreover, we emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion.

Douglas Oil Co, 441 U.S. at 223. Applying the Supreme Court's standards to the present case we are of the opinion that the district court did not abuse its discretion in granting disclosure to the Committee.

A. The Need for the Grand Jury Records

The district court could properly determine that the Committee's need for the grand jury records was both apparent and compelling. The Committee is charged under the Act with conducting an investigation in order to further "the effective and expeditious administration of the business of the courts . . . ." 28 U.S.C. § 372(6)(B). As already noted, the Committee's investigation is to be "as extensive as it considers necessary." Section 372(c)(5). A thorough investigation is essential not only to ensure the integrity of federal judges, but also to instill public confidence in the judiciary. See supra. The Committee must be able to represent to the Council, and the Council must be satisfied, that all available evidence of possible materiality has been sifted: for the Committee to

examine matters extensively and find nothing may be as much a part of its duty as to look at evidence whose incriminating nature is known in advance. The object of the investigation is not to prove a case against the judge but to determine whether there is or is not a case.

Here we believe the Committee established its need for access to the entire record of the grand jury that indicted Judge Hastings. The grand jury had focused solely on the alleged bribery incident for which Judge Hastings was indicted and upon which the complaint is based. Only by examining all of the record can the Committee determine the true state of the evidence for or against the charge. No content-based limitation on the requested access is feasible given the Committee's mission: the Committee is interested in both inculpatory and excul-

patory evidence that might have been revealed before the grand jury, and the committee and Council alone -- not the district court -- can properly determine what is and is not significant. To be sure, if the grand jury had investigated conduct or individuals unrelated to the alleged bribe a narrower order might have been required, but this is not such a case.[7]

This petition is quite different from that in connection with a civil suit. In the normal situation attorneys seek

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7. Judge Hastings contends that the confidentiality requirement in section 372(c)(14), see supra note 2, should be construed to prevent the Committee from even filing a petition because such a petition itself destroys confidentiality. To read the requirement this way would unduly restrict the very ability to investigate complaints. The statute requires only that "[a]ll papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential . . . ." We see no breach of confidentiality on the facts of this case.

grand jury material to build their case and thus, in the interest of grand jury secrecy, they must exhaust other means of securing the relevant information before being granted access. "[T]he court could take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure." United States v. Sells Engineering, Inc., 51 U.S.L.W. 5059, 5067 (June 28, 1983). This requirement is not appropriate in the present case because of the Committee's unique investigatory mission and the necessity that, when the investigation is over, the public be assured that it was complete. Since evidence before a grand jury is not necessarily presented at trial, the Committee's review of the entire grand jury record for relevant evidence is important to its task of

leaving no stone unturned.[8] Thus given its special responsibilities, we believe the Committee satisfied the "particularized need" standard by demonstrating a close nexus between the subject of the grand jury proceeding and the complaint under investigation. Nothing more was required on the facts of this case.[9]

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8. We note too that section 372(c)(5) requires the Committee to file its report "expeditiously." Insofar as speedy disposition of complaints against judges is desirable, we think it undesirable to require the Committee to attempt to replicate the grand jury's efforts.

9. Judge Hastings argues that the district court should have reviewed the grand jury record and released only relevant excerpts. But in this unique kind of situation, such a process would have been inappropriate. After the Committee's showing of a close nexus between the grand jury proceeding and the complaint, it would have been improper for the district court to substitute its own judgment on the relevance of particular portions of the grand jury records. We agree with the district court that, "[t]o do so would usurp the investigatory function Congress has placed within the exclusive province of the Special Committee."

B. The Secrecy Interest

Against the need for disclosure stands the competing public interest in grand jury secrecy. The Supreme Court has recognized five reasons for grand jury secrecy:

> 1) To prevent the escape of those whose indictment may be contemplated; 2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; 3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; 4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; 5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there is no probability of guilt.

United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954), quoted in Procter & Gambel, 356 U.S. at 681 n.6; see also

Douglas Oil Co., 441 U.S. at 219 n.10. In the present case the grand jury is no longer active and the trial of Borders and Judge Hastings has been completed. Thus the first three reasons are no longer of major concern. Furthermore, while Judge Hastings has an interest in avoiding disclosure of the contents of the grand jury records, his completed criminal trial removes the fear of disclosing the fact that he was under investigation, as well as the fear of unjustly standing trial. But the public interest in encouraging free and untrammeled testimony before future grand juries is still important. "Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities." Douglas Oil Co., 441 U.S. at 222 (footnote omitted).

The "reduced" interest in secrecy is further diminished in this case when

the identity of the party requesting access is considered. The Supreme Court has stated:

> The Douglas Oil standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. . . . For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public.

United States v. Sells Engineering, Inc., 51 U.S.L.W. at 5067. Here the Committee consists of federal judges, who can be expected as an obligation of their office to respect the confidentiality of grand jury records (one of their duties being to supervise grand juries). Further, the district court imposed protective conditions on the Committee's access. The location and reproduction of the records, the duration of their availability,

and the persons allowed access are all strictly limited by the district court's order.

C. Striking a Balance

When the competing concerns are balanced, we think the proper conclusion here is that the Committee's need for the records outweighs the public interest in secrecy. The Supreme Court has stated that "the district court may weigh the public interest, if any, served by disclosure to a governmental body -- along with the requisite particularized need -- in determining whether 'the need for disclosure is greater than the need for continued secrecy.'" Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356, 1362 n.15 (1983) (quoting Douglas Oil Co., 441 U.S. at 222). The district court correctly considered the important "public interest in the integrity and independence of the judiciary" in deciding to grant

disclosure. We see no grounds for concluding that the district court abused its discretion in granting the Committee restricted access to the grand jury records.

Judge Hastings's final argument is that the district court should have held an evidentiary hearing on his two "affirmative defenses": 1) that the petition is in furtherance of a conspiracy by the judges of the Eleventh Circuit to deprive Judge Hastings of his constitutional rights; and 2) that the disclosure is likely to result in leakage of the grand jury records to the public. Judge Hastings's charge that the Committee's investigation is part of a larger conspiracy is not a proper subject for consideration in this appeal. The investigation is being conducted pursuant to the Act and the district court was not the proper

forum for addressing any underlying questions of constitutional abuse. Those concerns may be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council.[10]

Judge Hastings's allegation of likely leakage is based on a news release circulated by the clerk of the Eleventh Circuit announcing the filing of the complaint against Judge Hastings and the appointment of an investigating committee. (See Appendix.) Judge Hastings, however, failed to point to any substantive disclosures relative to the investigation. Indeed, Judge Hastings's opposition to the Committee's petition admitted that Chief Judge Godbold, chairman of the Committee, had refused attempts by the press to

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10. Under section 372(c)(10) a judge aggrieved by an action of the judicial council of the circuit may petition the Judicial Conference of the United States for review of that action.

obtain further disclosures of information because of the confidentiality provision of the Act. Judge Hasting's sole basis for the claim that public disclosure is likely to occur is the assertion that the news release has "generate[d] investigative activity by the press that [will] make it unlikely confidentiality [will] effectively be maintained." While we do not pass on the propriety of the news release, we see no logical connection between the announcement of the investigation and a likelihood that the grand jury records will be publicized by the Committee. On the contrary, the court-imposed limitations on access and the Committee's apparent awareness of the confidentiality requirement of section 372(c)(14) lead to the opposite inference. In any event the district court did not err in rejecting this "affirmative defense" without holding an evidentiary hearing.

We conclude therefore that the restricted access granted by the district court must be AFFIRMED.

Our stay shall be lifted upon issuance of mandate.

So ordered.

APPENDIX

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk

Norman E. Zoller
Clerk

Tel 404-221-6187
Fts-242-6187
56 Forsyth St. N.W.
Atlanta, Georgia 30303

NEWS RELEASE April 15, 1983

A complaint has been filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit alleging that United States District Judge Alcee L. Hastings, of the Southern District of Florida, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. This complaint was filed pursuant to 28 U.S.C. Section 372 (c) (1) and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. Section 372 (c) as promulgated by the Judicial Council of the United States Court of Appeals for the Eleventh Circuit.

In compliance with Section 372 (c) and the Rule of the Eleventh Circuit, Chief Judge John C. Godbold of the Eleventh Circuit has appointed a special committee to investigate the facts and allegations contained in the complaint and to conduct an investigation as extensive as it considers necessary. The committee is composed of Chief Judge Godbold of Montgomery, Alabama; Circuit Judge Gerald Bard Tjoflat of Jacksonville, Florida; Chief Judge Frank M. Johnson, Jr. of Montgomery, Alabama; Chief District Judge Sam C. Pointer, Jr. of Birmingham, Alabama; and District Judge William C. O'Kelley of Atlanta, Georgia.

The investigating Committee has designated and appointed John Doar, Esquire, an attorney of New York, New York, who is a member of the bar of the United States Court of Appeals for the Eleventh Circuit as investigator to aid and assist the Committee in its investigation.

B. Opinion and Order of the District Court

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

IN RE PETITION TO IN-)
SPECT AND COPY GRAND) NO. 81-1-GJ (MIA)
JURY MATERIAL)

MEMORANDUM OPINION

GORDON, Senior District Judge

I.

THE ISSUE FOR DECISION

The motion before the Court raises a narrow issue: Whether a Special Investigating Committee appointed under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), ("the Act")[1] can gain access to the records and evidence before a grand jury, now discharged, that returned an

1. Pub. L. No. 96-458, § 3, 94 Stat. 2035, 2036-40 (codified at 28 U.S.C. § 372(c) (Supp. V 1981)). This portion of the Act is reprinted in the Appendix accompanying this Opinion. See also, Rules for the United States Court of Appeals for the Eleventh Circuit, Addendum Three. (Hereinafter cited as Eleventh Circuit Rules).

an indictment against an Article III Judge.

A. The Act

The Act outlines a procedure for the review and resolution of complaints alleging that a judge or magistrate "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts."[2] Under subsection (c)(3) of the Act, the Chief Judge of the Circuit is required "expeditiously" to review the complaint. In specified circumstances he may dismiss the complaint or "conclude the proceeding."[3] If the Chief Judge determines that such action is not appropriate, subsection (c)(4)(A) requires the Chief Judge to "appoint himself and equal numbers of circuit and district judges of the

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2. 28 U.S.C. § 372(c)(1) - See also Eleventh Circuit Rule 1.

3. 28 U.S.C. § 372(c)(3) - See also Eleventh Circuit Rule 3.

circuit to a special committee to investigate the facts and allegations contained in the complaint."[4] Following such investigation, the Special Committee is required to file a report with the judicial council of the circuit containing its findings and recommendations.[5] Upon receipt of this report, the council, which is authorized to conduct an additional investigation, is directed to take such action "as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to," actions specifically enumerated in the Act.[6] The remainder of the Act covers various procedural details.[7]

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4. 28 U.S.C. § 372(c)(4) - See also Eleventh Circuit Rule 4.

5. 28 U.S.C. § 372(c)(5) - See also Eleventh Circuit Rule 5(a).

6. 28 U.S.C. § 372(c)(6)-(c)(8). See also Eleventh Circuit Rules 6 and 7.

7. 28 U.S.C. § 372(c)(9)-(c)(17). See also Eleventh Circuit Rules 8-14.

B. The Complaint and the Special Committee Petition

On March 17, 1983, a verified written complaint was filed with the Clerk of the United States Court of Appeals for the Eleventh Judicial Circuit pursuant to the Act. The complaint alleged that United States District Judge Alcee L. Hastings had engaged in conduct proscribed by the Act.

On March 29, 1983, the Chief Judge of the United States Court of Appeals for the Eleventh Circuit issued an order pursuant to subsection (c)(4), appointing a Special Committee to investigate the March 17 complaint. Subsection (c)(5) of the Act requires this Committee to "conduct an investigation [of the facts and allegations contained in the complaint] as extensive as it considers necessary."[8] In the performance of this statutory duty,

8. 28 U.S.C. § 372(c)(5)

the Committee has petitioned this Court[9] for leave to examine the records, transcripts, minutes, and exhibits of the grand jury that had previously indicated Judge Hastings.[10] The petition is opposed by Judge Hastings[11] who, through counsel, has filed a motion seeking to have the petition dismissed, or in the alternative to have the grand jury material disclosed

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9. The grand jury whose records are at issue was empaneled under the supervision of this Court.

10. Judge Hastings was acquitted of these charges after trial.

11. It is clear that Judge Hastings has standing to object to disclosure. As an individual acquitted of charges brought upon a grand jury indictment, he was a continuing interest in the secrecy of the grand jury materials. Cf. Douglas Oil Co. v. Petro Stops Northwest, 441 U.S. 221, 218 n.8 (1979). See also, Illinois v. Sarbaugh, 552 F.2d 768, 772-73 (7th Cir.), cert. denied sub nom. J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977).

The other party indicated by the grand jury, though notified of these proceedings, has failed to either support or object to the petition.

to the public if the motion to dismiss is denied and disclosure to the Committee is allowed.[12]

C. Contentions

1. Opposition to the petition is first premised upon the argument that the Act prohibits the Special Committee from applying to this Court to obtain access to the grand jury materials. The Court finds no authority either in the Act or in its legislative history supporting this contention.

The Act evidences Congress' intent to create, within the existing judicial-

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12. Also before the Court is the motion of the Miami Herald Publishing Company to intervene and to allow public access to the grand jury materials. The motion shall be denied. It is clear that the Act prohibits the disclosure requested by the would-be intervenor. See § 372(c)(14).

administrative framework,[13] a procedure to deal fairly, authoritatively, and efficiently with complaints of misconduct or disability made against judges and magistrates. This system, approved in princi-

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13. Congress had previously rejected other proposals that had adopted an adversarial procedure for processing complaints of judicial misconduct or disability. See, e.g., S. 1423, 95th Cong., 1st Sess. (1977) (proposing Court on Judicial Discipline); reprinted in The Judicial Tenure Act: Hearing on S. 1423 Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. 3-18 (1977); S. 295, 96th Cong., 1st Sess. (1979) (proposing Court on Judicial Conduct and Disability), reprinted in Hearings on S. 295, S. 522, S. 678 Before the Subcommittees on Judicial Machinery and Constitution of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 127-59 (1979); S. 1873, 96th Cong., 1st Sess. (1979) (proposing Court on Judicial Conduct and Disability), reprinted in Judicial Tenure and Discipline 1979-80: Hearings Before the Subcommittee on Courts, Liberties and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st & 2nd Sess. 311-25 (1980).

ple by the judiciary,[14] serves to effectuate the public interest in ensuring and preserving an able, honorable, accountable, and independent judiciary. The goals of the Act were to "improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's justice system, and at the same time, to maintain the independence and autonomy of the judicial branch of government." H.R. Rep. No. 1313, 96th Cong., 2nd Sess. 1 (1980). A review of the legislative history reveals that the focal point of Congressional concern centered on the perceived need for a fair, effective, and efficient way to ensure accountability of powerful life-tenured federal judges to supplement the slow and

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14. See Report of the Proceedings of the Judicial Conference of the United States 57 (Sept. 1979); Report of the Judicial Conference of the United States 4-6 (March 1979).

cumbersome impeachment process.[15] Little guidance can be found on the narrow procedural question before this Court.[16]

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15. See, e.g., 126 Cong. Rec. S13859-60 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini); Id. at S13861-65 (statement of Sen. Mathias); Id. at H8785 (daily ed. Sept. 15, 1980) (statement of Rep. Kastenmeier); Id. at H8787 (statement of Rep. Gudger); Id. (statement of Rep. Rodino); 125 Cong. Rec. S15379-80 (daily ed. Oct. 30, 1979) (statement of Sen. DeConcini); Id. at S15385-27 (statement of Sen. Thurmond); Id. at S15393-97 (statement of Sen. Heflin); Id. at S15397-99 (statement of Sen. Bayh); Id. at S15412-14 (statement of Sen. Hatch); Id. at S 15419-21 (statement of Sen. Nunn).

16. Though subsection (c)(11) of the Act gives the judicial councils authority to "prescribe . . . rules for the conduct of proceedings" under the Act, the rules promulgated by the Judicial Council of the Eleventh Circuit generally reiterate the Act, thus offering little guidance. See Eleventh Circuit Rules, supra note 1. The rules adopted by the other circuit councils are similarly unenlightening. But see, Rules of the Judicial Council of the Third Circuit with respect to Complaints of Judicial Misconduct or Disability (hereinafter cited as Third Circuit Rules). See generally, Burbank, Procedure Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283 (1982); Neiser, The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer, 65 Judicature 143 (1981).

Nevertheless, the scant legislative history touching this area suggests that Congress did not intend to restrict the investigatory methods a Special Committee might pursue. Subsection (c)(5) of the Act imposes a duty upon the Committee to "conduct an investigation as extensive as it considers necessary."[17] Congress assigned and entrusted the duty and responsibility to committees of Federal Judges and intentionally gave them the wide latitude to investigate without limitation as they "consider [] necessary." Consistent with the desire to avoid an adversarial-disciplinary procedure, an "inquisitorial-administrative" approach was suggested and adopted for the conduct of such investigation, rather than an adversarial-trial concept. H.R. Rep. No. 1313, supra at 14. Subsection (c)(5) was therefore seen to "provide [] the

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17. 28 U.S.C. § 372(c)(5).

special committee with broad flexibility and general authority to investigate the facts and allegations contained in the complaint." Id. at 11. Thus, it is for the Committee to "control the objectives and nature of the inquiry." Id. at 14.

This Court recognizes the power and right of a Special Committee to petition for access to grand jury material. A contrary construction of the Act would be wholly inconsistent with its broad purposes--to preserve the integrity of the judiciary, to maintain public confidence in the judicial process, to protect the wrongfully accused, and to strengthen judicial independence. These goals are better served by a careful evaluation of the need asserted in the petition, rather than denying the authority of the Committee to initiate the petition in the final instance.[18]

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18. In addition, Judge Hastings asserts that the strict confidentiality provisions

2. Judge Hastings has also challenged the power of this Court to hear and decide this petition. It is concluded that this Court has jurisdiction to hear a petition seeking access, to the records of a discharged grand jury convened in its district. As a general rule, "requests for disclosure of grand jury transcripts

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18. (Cont'd.)

of the Act prohibit the initiation of this petition as well as its consideration by the Court. See 28 U.S.C. § 372(c)(14) and Eleventh Circuit Rule 12. Neither the petition nor this opinion violate the strictures of subsection (c)(14). We deal here solely with legal issues raised in briefs that were of public record. The confidentiality provisions of the Act are properly viewed as an effort to preserve the secrecy of "the facts and allegations contained in the complaint," and the facts and allegations subsequently uncovered during a Committee or Judicial Council investigation. The resolution of this matter was structured to present little risk that factual material would be improperly revealed to the public.

Nevertheless, the court is troubled by the fact that the file in this action is of public record. Henceforth, the confidentiality requirements of the Act and the Eleventh Circuit Rules should be scrupulously followed. See Eleventh Circuit Rule 13.

should be directed to the court that supervised the grand jury's activities." Douglas Oil Co. v. Petro Stops Northwest, 441 U.S. 211, 226 (1979). See also Fed. R. Crim. P. 6(e)(3)(D). Not only is this Court the only Court with authority and control over the grand jury records, but it also has the responsibility for maintaining the secrecy of the grand jury proceedings. Thus, the Committee, though an arm of the judiciary, had no choice but to petition this Court for access. Douglas Oil, supra at 225.

Subsection (c)(10) of the Act[19] does not prevent this Court from entertaining the petition. That section, properly read, prohibits only judicial review of the Special Committee's findings and recommendation. The Act does not foreclose all resort to the judicial power

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19. See 28 U.S.C. § 372(c)(10), infra. See also Eleventh Circuit Rule 8.

during the investigatory stage of a Special Committee's duty. Under subsection (c)(9)(A), the Special Committee has the authority to exercise the subpoena power. If, during its investigation, a witness should refuse to obey the command of the subpoena, the Committee certainly would have the authority to invoke the jurisdiction of the appropriate court to seek enforcement of the subpoena. In reaching a decision on enforcement, the Court does not run afoul of subsection (c)(10). In a similar fashion, the Committee can attempt to supplement its investigatory efforts by petitioning for access to grand jury material, without requiring this Court to conduct the review prohibited by subsection (c)(10).

Finally, the argument is made that under 28 U.S.C. § 455(a)[20] all Article

20. 28 U.S.C. § 455(a) provides that "Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

III judges are disqualified from hearing this petition. To hold that all Article III judges are disqualified to hear the petition would severely limit the work of the committee and is contrary to the obvious intent of Congress. The public interest in a fair and correct resolution of this crucial matter requires this Court to accept its responsibility "to say what the law is," albeit for the first time. Murbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Therefore, this Court finds that the Rule of Necessity requires that this forum be and remain open and available for a ruling on the petition. See United States v. Will, 449 U.S. 200, 217 (1980); DuPlantier v. United States, 606 F.2d 654, 662 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981); Atkins v. United States, 556 F.2d 1028, 1035-40 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

II.

RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The decision to grant access to grand jury material is committed to the "substantial discretion" of the district court. Douglas Oil, supra, at 223; see also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959). Opposition to this petition is based upon the assumption that Fed. R. Crim. P. 6(e)(3)(C)(i) (hereinafter "the Rule" or "Rule 6(e)")[21] provides the exclusive framework within which this discretion is to be exercised. The Committee, on the other hand, contends that Rule 6(e) does not preclude this Court from fashioning an alternative method for disclosure under

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21. Fed. R. Crim. P. 6(e)(3)(C)(i) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made -- (i) when so directed by a court preliminarily to or in connection with a judicial proceeding. . . ."

its general supervisory authority over grand jury proceedings and records.

Rule 6(e)(3)(C)(i) stands as a codification of the common law rule that the secrecy of grand jury material is to be preserved except in those rare instances where disclosure is necessary to prevent injustice. The Rule recognizes that litigants in a "judicial proceeding", see United States v. Baggot, 103 S.Ct. 3164 (1983), will occasionally have a "particularized need", see United States v. Sells Engineering, Inc., 103 S.Ct. 3133 (1983), for grand jury material to prevent an injustice in that proceeding. Thus, disclosure has been deemed proper to impeach a witness or test his credibility, see, e.g., Dennis v. United States, 384 U.S. 855, 868-75 (1966); United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958), or to refresh a witness'

recollection, see, e.g., Douglas Oil, supra at 222 n.12, In re Corrugated Container Antitrust Litigation, 687 F.2d 52 (5th Cir. 1982).

Baggot and Sells reaffirm the broad applicability of the Rule for garden-variety petitions for grand jury disclosure. The unique circumstances out of which this petition arise, coupled with the recognized need for access by the Committee to enable it to perform its statutory duty, clearly remove this petition from the "narrow area" of secrecy codified by the Rule. In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1227 (D.D.C. 1974). This Court is not persuaded that a Committee composed of Article III judges, acting as an arm of the judiciary and in furtherance of a Congressional mandate, has no authority other than that given by Rule

6(e) to review grand jury material. In similarly unique circumstances, it has been recognized that the Rule is not the sole repository of the district court's authority to grant access to grand jury records. In re Biaggi, 478 F.2d 489, 492-93 (2nd Cir. 1973); In re Report and Recommendation of June 5, 1972 Grand Jury, supra at 1227-29; In re Bullock, 103 F. Supp. 639, 641 (D.D.C. 1952); see also In re Grand Jury Investigation of Ven-Fuel, 441 F.Supp. 1299, 1304-07 (M.D. Fla. 1977). This is because "Rule 6(e) . . . was not intended to create new law, [and] remains subject to the law or traditional policies that gave it birth." In re Report and Recommendation of June 5, 1972 Grand Jury, supra at 1229. These traditional policies demonstrate that the primary concern is which course--disclosure or non-disclosure--will further the

ends of justice and the search for the truth. United States v. Socony-Vacuum, 310 U.S. 150, 233-34 (1940). The inherent power of the supervising court to disclose grand jury material will be affirmatively exercised only if the recognized need for the material outweighs the traditional considerations justifying secrecy. Therefore, it is this Court's duty to balance the need for effective administration of the Congressionally established procedure for judicial self-discipline against the traditional factors favoring the "'indispensable secrecy of [the] grand jury proceedings.'" Proctor & Gamble, supra at 681 (quoting United States v. Johnson, 319 U.S. 503, 513 (1943)). A careful evaluation of these competing concerns leads this Court to the inescapable conclusion that the minimal trespass upon the traditional values associated with grand jury

confidentiality is significantly outweighed by the need of the Special Committee to examine the grand jury material and expeditiously execute its Congressional duty, thereby furthering the broad purposes of the Act.

The traditional policies advanced for preserving the secrecy of grand jury material have been "correctly summarized" as

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of

> standing trial where there was no probability of guilt.

Douglas Oil, supra at 219 n.10 (quoting United States v. Rose, 215 F.2d 617, 628-29 (3rd Cir. 1954).

The first three reasons for secrecy are no longer applicable where, as here, the grand jury has concluded its investigation and has been discharged. United States v. Moten, 582 F.2d 654, 663 (2nd Cir. 1978); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281, 287 (8th Cir. 1978); Illinois v. Sarbaugh, 552 F.2d 768, 775 (7th Cir.), cert. denied sub nom. J. L. Simmons Co. v. Illinois, 434 U.S. 889 (1977); In re Report and Recommendation of June 5, 1972 Grand Jury, supra at 1229; see also, United States v. Socony-Vacuum, supra at 234 ("[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.").

There has been no showing that allowing the Special Committee access will impede an ongoing investigation, or otherwise affect any civil or criminal proceeding. The rationale of the fourth and fifth reasons, however, still has force in these circumstances. Preserving the secrecy of past grand jury proceedings facilitates the effective functioning of future grand juries, by reassuring future witnesses that their testimony will, as a general rule, remain confidential. Douglas Oil, supra at 222. In addition, Judge Hastings clearly falls within the class protected by the fifth reason for grand jury secrecy: He is an "innocent accused." Although the return of an indictment against Judge Hastings removed his interest in maintaining the secrecy of the existence of the grand jury investigation, his subsequent acquittal intensifies his

interest in preserving the secrecy of the grand jury material itself.

Balanced against the interest in preserving uninhibited witness testimony and the primary interest of an individual acquitted of criminal charges, is the overriding Congressional determination that the judiciary shall have the responsibility and authority to police itself. The public and Congressional interest in the effective administration of the Act is compelling.[22] The Act requires a full, fair, and timely investigation by the Committee so that public confidence in

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22. This compelling public interest has been recognized in other comparable circumstances. For example, in In Re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) five policemen moved to vacate two prior district court orders authorizing disclosure to the Superintendent of Police of the grand jury transcripts of the policemen's testimony before the grand jury. In affirming the district court, the court of appeals noted that "[b]ecause the maintenance of police integrity and credibility is essential to public confidence, the

judicial integrity and credibility may be preserved. Society is entitled to have a mechanism that works to the end that innocent judges and magistrates are protected in their reputations and independence and that the judiciary is kept

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22. (Cont'd.)

disclosure of testimony by policemen to a police board in order to discipline those abusing public offices is a sufficient public interest to override the policy of shielding the grand jury from public scrutiny." Id. at 89B. The required need under Rule 6(e) was therefore satisfied. In United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977), aff'd sub nom. In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978) a proceeding under Rule 6(e) was instituted by the City of Omaha, the Council on Discipline of the Nebraska State Bar Association, the Nebraska Commission of Judicial Qualifications, and a member of the Judiciary Committee of the Nebraska Legislature to obtain grand jury materials that alleged misconduct by various government officials. The court observed that "[r]eestablishing faith in state and city governments by proving or disproving the faithfulness of [public] officials is a goal with enough urgency to carry a major part of a compelling and particularized need." 437 F. Supp. at 245.

honorable and perceived to be so. This Court, itself governed by the Act, cannot reasonably deny other judges access to information that will shed light on the truth. The Court has no evidence that Congress anticipated that this type of proceeding might be brought under the Act. Nevertheless, to deny the petition would thwart the broad intent of the Act, and not serve the traditional policy upon which grand jury secrecy is based. Since the request is within the authority of the Committee, the Court should "presumptively favor disclosure" to those who are charged with the responsibility for performing duties under this stage of the Act. Cf. In re Report and Recommendation of the June 5, 1972 Grand Jury, supra at 1227. The petition must be and will be granted.

III.

CONCLUSIONS

A. Disclosure to Committee

Disclosure to the Special Committee impinges only slightly upon the traditional interests that remain in preserving grand jury secrecy in this proceeding, while simultaneously allowing the Committee expeditiously to comply with its Congressional directive. The continuing interest of Judge Hastings in maintaining the validity of his acquittal cannot be gainsaid. This interest, however, must be subordinated to the public interest in the integrity and independence of the judiciary.[23] The Act requires that this inter-

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23. The public interest in the effective operation of the judicial branch has, in other circumstances, been deemed sufficient to permit disciplinary proceedings to be brought against members of the bar subsequent to their acquittal of criminal charges. See, e.g., In re Echeles, 430 F.2d 347, 350 (7th Cir. 1970) ("the real question at issue . . . is the public

est be vindicated through the judicial self-regulation mechanism it outlines. Prior acquittal of specific criminal charges does not obviate the need for further inquiry under the Act, for the Act encompasses any conduct "prejudicial to the effective and expeditious administration of the business of the courts." § 372(c)(1). At stake in the petition before the Court is nothing less than the public's faith and trust in the judicial system.

Furthermore, disclosure to the Committee, an arm of the judiciary,

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23. (Cont'd.)

interest and [the] right to continue to practice a profession imbued with the public trust"); Best v. State Bar of California, 57 Cal. 2d 633, ___, 371 P.2d 325, 328, 21 Cal. Rptr. 589, ___ (1962) (The proceeding "is for the protection of the public, the courts, and the legal profession."); Ohio State Bar Ass'n v. Weaver, 41 Ohio St. 2d 97, ___, 322 N.E.2d 665, 667 (1975) (Proceedings "are instituted to safeguard the courts and to protect the public.").

presents little risk of chilling the truthful testimony of prospective witnesses before future grand juries. Cf., Douglas Oil, supra at 219. The Committee is composed of judges who routinely have the duty to review grand jury materials in the performance of the duties of their offices. The Committee does not seek public dissemination, but disclosure only to itself, and is bound by the Act to keep "[a]ll paper, documents, and records of proceedings related to investigations . . . confidential." § 372(c)(14). Disclosure to the Committee carries none of the risks associated with disclosure to private or government petitioners. Cf., United States v. Sells Engineering, supra at 3142. The traditional sanctity of grand jury records will be substantially preserved by the character of the parties to whom the material will be disclosed and

the broad confidentiality provisions of the Act. In addition, the Court will impose in its order entered contemporaneously stringent "protective limitations on the use of the disclosed material" to further ensure confidentiality. Douglas Oil, supra at 223.

The unique circumstances out of which this petition arises, coupled with the status of the parties who will review the material and the confidentiality requirements of the Act, also make it inappropriate for this Court to conduct an in camera review of the grand jury records before their release. In the usual case, it is necessary to limit access solely "to that material directly pertinent to the need for disclosure." Douglas Oil, supra at 224; see also Proctor & Gamble, supra at 683 (disclosure is to be "discretely and limitedly"). This is usually accom-

plished by in camera inspection, see, e.g., United States v. Sobotka, 623 F.2d 764 768 (2nd Cir. 1980); United States v. Duff, 529 F.Supp. 148, 156 (N.D.Ill. 1981); In re Midwest Milk Monopolization Litigation, 454 F. Supp. 281, 287-88 (W.D.Mo. 1978), or other procedures that assure that the competing interests in secrecy and disclosure are properly evaluated, see, e.g., Douglas Oil, supra at 226-31; In re Grand Jury Proceedings (Wright II), 654 F.2d 268, 272-75 (3rd Cir.), cert. denied, 454 U.S. 1098 (1981); Illinois v. Sarbaugh, supra at 773; In re Disclosure of Testimony Before the Grand Jury (Troia), supra; United States v. Alston, 491 F.Supp. 215 (D.D.C. 1980). Here, however, Congress has imposed a duty upon this Special Committee to conduct a thorough investigation and evaluation of the complaint referred to it. It would

be contrary to the intent of the Act to allow this Committee access only to that grand jury evidence which this Court deems relevant. To do so would usurp the investigatory function Congress has placed within the exclusive province of the Special Committee.[24] Therefore, to the extent it has the discretion to make an in camera review of the grand jury material sought by this petition, this Court exercises its discretion not to do so.

B. Disclosure to Judge Hastings

Having concluded that the petition of the Special Committee shall be granted, the Court is presented with two additional

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24. Furthermore, the Court will not require that the Committee demonstrate that it had exhausted all alternative investigatory channels before seeking the material at issue here. Cf. United States v. Sells Engineering, supra at 3142; In re Grand Jury Proceedings, Miller Brewing Co., 687 F.2d 1079, 1092 n.17 (7th Cir. 1982).

issues: (1) whether Judge Hastings is entitled at this point to equal access, and (2) whether Judge Hastings is entitled to discovery and evidentiary rights to defend against disclosure. Counsel for Judge Hastings contends that both of these procedural issues must be resolved by the Court if the motion to dismiss the petition is denied.

Though neither the Act nor the Local Rules speak directly to these procedural issues, they do offer general guidance. The Act describes the Special Committee's responsibility with reference to both "investigations" and "proceedings." The structure of the Act and the "inquisitorial-administrative" model upon which it is based suggest a distinction between an "investigation" and a "proceeding." Cf. § 372(c)(5) and Eleventh Circuit Rule 5(a) with § 372(c)(11) and Eleventh

Circuit Rule 5(b). The sole duty at the investigatory stage of the Committee's work is to "conduct an investigation as extensive as it considers necessary." § 372(c)(5). This "broad flexibility and general authority to investigate," H.R. Rep. 1313, supra at 11, is unhindered by any specified procedural requirements. In contrast, the Act requires that any rules prescribed by the judicial councils or the Judicial Conference "for the conduct of proceedings" under the Act contain certain procedural rights. See § 372(c)(11). The "minimal due process rights," H.R. Rep. 1313, supra at 14, that must be afforded a judicial officer whose conduct is the subject of a complaint are

> an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine

> witnesses, and to present argument orally or in writing.

§ 372(c)(11)(B). The Eleventh Circuit Rules secure these rights in language that generally tracts the Act. See Eleventh Circuit Rule 5(b).

These procedural rights are intended to insure that the findings and recommendations of the Special Committee will not be arbitrary. See H.R. Rep. 1313, supra at 14. These procedural protections, however, are triggered only at the point "proceedings [are] conducted by" the Committee. § 372(c)(11)(B). This petition does not require this Court to determine the point at which a Special Committee's activities shall be denominated a "proceeding".[25] What is clear,

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25. But see Third Circuit Rule 1(E), which defines "proceeding" to mean "any meeting of a special committee . . .or of the Judicial Council at which record evidence is taken."

however, is that this petition, and the evidence that will be obtained from its grant, fall within the investigatory sphere of the Committee's activities. During the investigatory stage, the required procedural protections are minimal at most. See, e.g., Hannah v. Larche, 363 U.S. 420, 440-53 (1960): McCartney v. Commission on Judicial Qualifications, 116 Cal. Rptr. 260, 265, 526 P.2d 268, 273 (1974); In re Troy, 364 Mass. 15, _____, 306 N.E.2d 203, 207-09 (1973); In re "Judge Anonymous", 590 P.2d 1181, 1185-89 (Okla. 1978).[26]

There may or may not be "proceedings" resulting from the Committee's investigation in which, under the Act and our

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26. See also, Third Circuit Rule 6(B)(i) Reporters Note, indicating that "[w]itnesses can be interviewed and documents secured without the participation of the judge or magistrate whose conduct is the subject of the complaint."

traditional concepts of procedural due process, Judge Hastings will be entitled to the full range of defenses and procedures to effect them, but the Court's ruling on this investigative petition is not such a "proceeding."[27] The type and scope of the Judge's procedural rights at this stage of the Committee investigation is a matter whose final resolution is committed to the Judicial Council of the Eleventh Circuit and the Judicial Conference of the United States.

Under subsection (c)(11) of the Act, both the Judicial Council and the Judicial Conference have the authority to prescribe rules governing the procedural questions

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27. Before this court, Judge Hastings has been given all the process which he is due: notice and an opportunity to be heard. Cf. Fed. R. Crim. P. 6(e)(3)(D).

raised here.[28] In addition, the Act provides that a complainant or judicial officer "aggrieved by an action of the judicial council . . . may petition the Judicial Conference of the United States [or its standing committee established under 28 U.S.C. § 331] for review thereof." § 372(c)(1). The Court can assume, arguendo, that procedural questions might appropriately be raised in that forum.

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28. See § 372(c)(11). Subsection (c)(11) has given the judicial councils the flexibility to experiment and develop procedures under the Act. For example, three councils offer differing interpretations of the question whether the Federal Rules of Evidence should be applied at "proceedings" conducted by the special committee or the council. The First Circuit Rules state that "[t]he proceedings will be guided by but not bound by the Federal Rules of Evidence." See First Circuit Rule 14. The Second Circuit provides that "[a]t the request of the judicial officer whose conduct is the subject of a complaint, the Federal Rules of Evidence shall apply. See Second Circuit Rules 24(c). Finally, the Third Circuit provides that "[e]xcept where inappropriate, the provisions of the Federal Rules of Evidence shall govern." See Third Circuit Rules 6(D)(iv) and 7(D)(iv).

Thus, beyond those procedural rights mandated by subsection (c)(11), it is for the Judicial Conference or the judicial council to determine if, when, and what procedural protections shall be afforded a judicial officer subject to a complaint under the Act.[29] Cf. In re Imperial "400"

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29. See also, H.R. Rep. 1313, supra at 4. ("[R]ather than create luxurious mechanisms such as special courts and commissions--with all the trappings of the adversarial process, including legal counsel, written transcripts, discovery and cross examination, the legisla[tion] plac[es] primary administrative responsibility within the judicial branch of government.")

The Court notes that at oral argument, counsel for the Committee suggested that the Committee could not issue its report without a "proceeding" under subsection (c)(11). Counsel indicated that Judge Hastings would be given access to the grand jury material if such a "proceeding" were to occur. The Court expresses no opinion as to the validity of counsel's suggested procedure. But see Third Circuit Rule 6(c), which provides that "[t]he judge or magistrate whose conduct is the subject of the complaint shall have access to all documents before the Special Committee at such time as is appropriate in light of the needs of the Special Committee's investigation and the [right to receive notice and an opportunity to appear or present argument.]."

National, Inc., 481 F.2d 41, 47-49 (3rd Cir.), cert. denied sub nom. Judicial Council of the Third Circuit v. Nolan, 414 U.S. 880 (1973). Judge Hastings' request that this Court afford him certain procedural rights and protections is therefore premature.[30] See Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970).

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30. Since the responsibility for developing procedural rules lies with the judicial council and the Judicial Conference, the Court cannot agree with Judge Hastings's vigorous assertion that the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence must apply to the resolution of this petition. This is an extraordinary proceeding where the judicial power has been invoked to resolve an administrative matter wholly within the judicial branch of government. Judge Hastings is not a defendant before this Court; the Committee is neither plaintiff nor prosecutor. This proceeding thus bears few of the indicia usually found in those actions to which the federal rules apply.

DECISION

For the foregoing reasons, the Court finds that the substantial interest in judicial accountability, integrity, and independence -- safeguarded by the Act's self-discipline mechanism -- significantly outweighs the lesser public interest in precluding the narrowly circumscribed, non-public disclosure sought by the Committee for its limited statutory purpose. Therefore, the petition of the Special Committee will be GRANTED, the motion to dismiss the petition will be DENIED, and the cross-petition for full public disclosure will be DENIED in a separate Order filed contemporaneously with this Opinion.

/s/ Eugene A. Gordon
United States District Judge

December 19, 1983*

[*Court's Appendix omitted because statute is separately reproduced in this Appendix, infra.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS	)))	NO. 81-1-GJ (MIA)

O R D E R

For the reasons discussed in a Memorandum Opinion filed contemporaneously herewith,

IT IS ORDERED that the petition filed by the Special Committee of the Judicial Council of the Eleventh Circuit to inspect the grand jury records in United States v. Hastings, 81-596-Cr., Grand Jury No. 81-1-GJ (MIA) is GRANTED, subject to the conditions set out in this Order; the motion of Judge Alcee L. Hastings to dismiss the petition is DENIED; and the cross-petition of Judge Alcee L. Hastings for Public disclosure of the Grand Jury Records is DENIED.

1. IT IS FURTHER ORDERED, that the United States Attorney for the Southern

District of Florida (Miami) shall procure and disclose to the Special Committee and its two designated counsel all records, transcripts, minutes, and exhibits of Grand Jury 81-1-GJ (MIA). The Committee and counsel shall have access to these Grand Jury Records from the tenth (10th) day following the date of the entry of this Order, and for a period of ninety (90) days thereafter.

2. IT IS FURTHER ORDERED, that the only persons to whom the Grand Jury Records are to be disclosed are the Special Committee Members, Hon. John C. Godbold, Hon. Gerald B. Tjoflat, Hon. Frank M. Johnson, Jr., Hon. Sam C. Pointer, Jr., Hon. William C. O'Kelley, and the Committee's Counsel, John Doar, Esq. and G. Stewart Webb, Jr., Esq. In addition, the Special Committee shall designate one additional person to provide

secretarial assistance to the Committee and counsel. The person so designated shall execute a written oath before an Article III Judge not to reveal any matters that occurred before the grand jury, unless ordered to do so by this Court.

3. IT IS FURTHER ORDERED, that the Special Committee and its counsel shall review the material in the office of the United States Attorney for the Southern District of Florida at Miami, or at some other place mutually agreeable to the Committee and the United States Attorney in the United States Courthouse, Miami, Florida. The United States Attorney for the Southern District of Florida shall have the responsibility for implementing the provisions of this Order and the continuous responsibility for preserving the secrecy of the Grand Jury Records.

4. IT IS FURTHER ORDERED, that the review of the Grand Jury Records shall take place at such hours as are mutually convenient for the United States Attorney and the Committee. No persons other than the members of the Special Committee and Messrs. Doar and Webb shall be allowed to be present in the room while any substantive discussion of the Records is taking place. The Office of the United States Attorney shall provide such other security measures as will ensure the secrecy of the Grand Jury Records, including but not limited to a log noting the datas and times the records are reviewed, and the names of the persons conducting the review. The log shall be recorded by the United States Attorney or a designated United States Marshal. The log shall be maintained separate and apart from all other records and files, under appropriate

security precautions as to ensure confidentiality.

5. IT IS FURTHER ORDERED, that except as provided in Paragraph Six (6) of this Order, there shall be no reproduction of the Grand Jury Records, by photocopying, electronic reproduction or recording, or by any other means, manual or mechanical. The members of the Special Committee and Messrs. Doar and Webb may take written or recorded notes of the records reviewed. These notes, however, shall remain in their sole and absolute possession, and shall not be reproduced nor viewed by any person not associated with the Committee. In addition, the members of the Special Committee and counsel shall maintain a confidential master index describing each Grand Jury document reviewed in the course of the investigation.

6. IT IS FURTHER ORDERED, that the Special Committee and Messrs. Doar and Webb shall be permitted to make one (1) copy of those Grand Jury Records necessary to substantiate or supplement the written report required under 28 U.S.C. § 372(c)(5). These copies shall be sealed and remain with the United States Attorney for the Southern District of Florida at Miami, except during those periods when the copies shall be necessary for the Special Committee to execute its duty under 28 U.S.C. § 372(c)(5). Thereafter, the copies shall be returned to the United States Attorney for the Southern District of Florida and replaced under seal. There shall be no other reproductions made of the Grand Jury Records without leave of this Court.

7. IT IS FURTHER ORDERED, that the members of the Special Committee, Messrs.

Doar and Webb, and the secretarial assistant provided for in Paragraph Two (2) of this Order shall hold in the strictest confidence all information and inferences that may be gleamed from the Grand Jury Records.

8. This Court retains its authority and control over the Grand Jury Records. This Order, however, shall not be construed to deny the Special Committee any powers reserved to it under 28 U.S.C. § 372(c).

/s/ Eugene S. Gordon
United States District Judge

December 19, 1983

C. Orders on Rehearing and Stay of Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5003

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

THE HONORABLE ALCEE L. HASTINGS,
Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING
(Opinion June 20, 1984, 11 Cir., 1984, F.2d).
(August 3, 1984)

Before CAMPBELL*, Chief Judge, PELL** and KEARSE***, Circuit Judges.

*Honorable Levine H. Campbell, Chief Judge for the U.S. Court of Appeals for the First Circuit, sitting by designation.

**Honorable Wilbur F. Pell, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

***Honorable Amalya Lyle Kearse, U.S. Circuit Judge for the Second Circuit, sitting by designation.

BY THE COURT:

By way of clarification, the opinion is amended by inserting at page 4231, column 2, line 30, after the period, "To all appearances," and changing the capital "T" in "The" to lower case. The first full sentence on Page 4232 is revised to read as follows:

> To be sure, if it had been brought out that the grand jury minutes were likely to include substantial separable material unrelated to any proper object of the Committee's investigation, a different order might have been appropriate, but this is not such a case.

The petition for rehearing is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5003

IN RE: PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

THE HONORABLE ALCEE L. HASTINGS,
Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

* * *

(xx) The motion of appellant for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including August 27, 1984, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of

this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this court within that time.

* * *

/s/ Levin H. Campbell
UNITED STATES CIRCUIT JUDGE

D. Other Materials

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS	:	Misc. No.

PETITION OF THE INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT TO INSPECT AND COPY GRAND JURY MATERIALS

The Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee"), by its undersigned counsel, respectfully petitions this Court for an order permitting the committee, or its designated representatives, to inspect and copy certain grand jury materials for use in connection with an investigation and proceeding under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) (the "1980 Act"). As grounds for this Petition, the Committee states:

1. A verified complaint has been filed with the clerk of the United States Court of Appeals for the Eleventh Circuit pursuant to the 1980 Act and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. § 372(c), as promulgated by the Judicial Council of the Eleventh Circuit. The complaint alleges that United States District Judge Alcee L. Hastings has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.

2. By order entered March 29, 1983, the Chief Judge of the Eleventh Circuit, acting pursuant to 28 U.S.C. § 372(c)(4), appointed the Committee to investigate the facts and allegations of the complaint. Under 28 U.S.C. § 372(c)(5), the Committee "shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written

report thereon with the judicial council of the circuit."

3. On December 29, 1981, a duly convened grand jury in and for the Southern District of Florida returned an indictment in case No. 81-596 charging William A. Borders, Jr. with violation of 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 1503 (obstruction of Justice) and 18 U.S.C. § 1952 (interstate travel with intent to commit a crime), and charging Alcee L. Hastings with violation of 18 U.S.C. § 371 (conspiracy) and 18 U.S.C. § 1503 (obstruction of justice).

4. As part of its investigation of the facts and allegations of the complaint filed against Judge Hastings, the Committee has determined that it must examine the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and

Mr. Borders. By this Petition, the Committee seeks access to those grand jury materials.

5. The record, transcript, minutes and exhibits of the aforesaid grand jury are in the custody of the United States District Court for the Southern District of Florida.

6. The Committee is required by statute to conduct and maintain its proceedings in confidence. 28 U.S.C. § 372(c)(14). Release of grand jury materials to the Committee will not, therefore, constitute public disclosure. Grand jury materials disclosed to the Committee will not be further disclosed, except in accordance with 28 U.S.C. § 372(c)(14).

7. The persons having an interest in this Petition are:

(A) Hon. Alcee L. Hastings, United States District Judge;

(B) William C. Borders, Jr.; and

(C) United States Department of Justice (Reid Weingarten, attorney, Public Integrity Section, Criminal Division, Washington, D.C.).

8. On April 29, 1983, the Committee moved to obtain the grand jury materials in United States v. Hastings, 81-596-Cr.-ETG. Judge Hastings, by counsel, filed a written objection to the committee's motion, arguing that the grand jury materials must be sought in a separate civil proceeding. To eliminate any question as to the Court's jurisdiction, the Committee is filing this Petition.

9. By memorandum dated May 23, 1983, the Hon. Edward T. Gignoux, United States District Judge, established a briefing schedule for the Committee's motion in the criminal case, and for other pending

motions as well, and set oral argument for June 24, 1983. To ensure the expeditious resolution of this Petition, the Committee requests that this Petition be set for hearing at the same time and place and in conjunction with the hearing on the motions pending in the criminal case -- to wit, at the United States District Court for the Southern District of Florida, in Miami, Florida, on Friday, June 24, 1983, at 10:00 a.m.

10. In support of this Petition, the Committee further relies upon the accompanying memorandum.

WHEREFORE, the Committee asks this Court as follows:

(1) To set this Petition for hearing for June 24, 1983, at 10:00 a.m., at the United States District Court in Miami, Florida.

(2) At the conclusion of the aforesaid hearing, to enter an order directing

the Clerk of the United States District Court to transmit to the Investigating Committee forthwith the record, transcripts, minutes and exhibits of the proceedings of the grand jury that returned the indictment in case No. 81-596 against William A. Borders, Jr. and Alcee L. Hastings.

June 2, 1983

/s/ John Doar
John Doar

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/s/ G. Stewart Webb, Jr.
G. Stewart Webb, Jr.

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E. Statute and Rule

1. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372, 604 (1982)

An Act

To revise the composition of the judicial councils of the Federal judicial circuits, to establish a procedure for the processing of complaints against Federal judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980".

JUDICIAL COUNCILS OF THE CIRCUITS

SEC.2.(a) Section 332(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of--

"(A) the chief judge of the circuit who shall preside;

"(B) that number of circuit judges fixed by majority vote of all such judges in regular active service; and

"(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that--

"(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparaqraph shall be no less than two; and

"(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

"(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

"(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

"(4) Only circuit and district judges in regular active service

shall serve as members of the council.

"(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit."

(b) Section 332(c) of title 28,

United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas

duces tecum issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council."

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332. Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 15 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits."

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC.3.(a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this

subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may--

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural

ruling or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council--

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

"(i) directing the chief judge of the district of magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

"(iii) rquesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order

removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of

the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct--

"(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

"(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

"(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

" 8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be

warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

"(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

"(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

"(10) A complainant, judge, or magistrate aggrieved by a final

order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

"(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--

"(A) Adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

"(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to

cross-examine witnesses, and to present argument orally or in writing; and

"(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information."

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

"(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon

the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

"(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

"(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceedings unless--

"(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by

resolution, releases any such material which is believed necessary to an impeachment investigation or trial or a judge under article I of the Constitution; or

"(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

"(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate

clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

"(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

"(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for

the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection."

(b) The section heading for section 372 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline."

(c) The item relating to section 372 in the section analysis for chapter 17 of title 28, United States Code, is amended to read as follows:

"372. Retirement for disability; substitute judge on failure to retire; judicial discipline."

AUTHORITY OF THE JUDICIAL CONFERENCE

SEC. 4. The fourth undesignated paragraph of section 331 of title 28, United States Code, is amended to read as follows:

"The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all

petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial

officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section."

ADMINISTRATIVE OFFICE
OF UNITED STATES COURTS

SEC. 5. Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h)(1) The Director shall, out of funds appropriated for the operation and maintenance of the courts, provide facilities and pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference under section 372 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title. Administrative and professional assistance from the Administrative Office of the United States Courts may be re-

quested by each judicial council and the Judicial Conference for purposes of discharging their duties under section 372 of this title.

"(2) The Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken."

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 7. This Act shall become effective on October 1, 1981. Approved October 15, 1980.

2. Rule 6(e), Federal Rules of Criminal Procedure

Rule 6. The Grand Jury

* * *

(e) Secrecy and Disclosure.

(1) Recording of Proceedings.

. . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy.

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . .

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

. . .

(C) Disclosure otherwise prohibited by this rule of matters

occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceedings;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.